



City of NORFOLK

C: Dir., Department of General Services

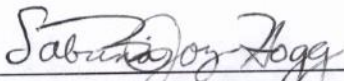
To the Honorable Council
City of Norfolk, Virginia

August 25, 2015

From: David S. Freeman, AICP
Director of General Services

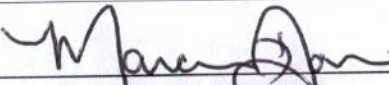
Subject: Encroachment Agreement
for Outdoor Dog Play Area at 3700
Hampton Boulevard

Reviewed:


Sabrina Joy Hogg, Deputy City Manager

Ward/Superward: 2/7

Approved:


Marcus D. Jones, City Manager

Item Number:

R-16

I. **Recommendation:** Adopt Ordinance

II. **Applicant:** Muddy Paws
Building Owner: Dover Point, L.L.C

III. **Description:**

This agenda item is a new encroachment agreement between The City of Norfolk ("City") and Muddy Paws which will grant Muddy Paws permission to encroach into the right of way of 37th Street at 3700 Hampton Boulevard with an area extending 5' for the purpose of creating an outdoor dog play area in conjunction with the operation of their boarding kennel, approved by the City of Norfolk.

IV. **Analysis**

The Encroachment Agreement will permit Muddy Paws to encroach a total area of 325 square feet at 3700 Hampton Boulevard and 37th Street. The extension of 5' will be enclosed with a stockade fence (50% open) and dumpster, 4' with a chain link fence, and 10' with parking into 37th Street right-of-way. The term of the encroachment will commence on March 1, 2015 and terminate February 29, 2020. It is subject to Council revocation and the tenant shall be responsible for their obligations with respect to the encroachment defined regardless of who is operating in the encroachment area. The city is named as additional insured.

Hours of Operation:

Daily 7:00 a.m. – 7:00p.m.

V. Financial Impact

The total square feet of the encroachment area is 325 which constitutes annual rent as follows, with an annual 1.5% escalation:

Term	Annual Lease Payment
3/1/2015 - 2/29/2016	\$812.50
3/1/2016 - 2/28/2017	\$824.68
3/1/2017 - 2/29/2018	\$837.05
3/1/2018 - 2/28/2019	\$849.60
3/1/2019 - 2/29/2020	\$862.34

VI. Environmental

There are no known environmental issues associated with this property.

VII. Community Outreach/Notification

Public notification for this agenda item was conducted through the City of Norfolk's agenda notification process.

VIII. Board/Commission Action


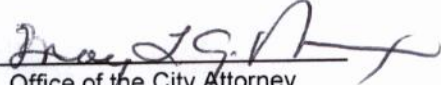
The outdoor dining request was approved by the Design Review Committee.

IX. Coordination/Outreach

This ordinance has been coordinated with the Department of General Services – Office of Real Estate and the City Attorney's Office.

Supporting Material from the City Attorney's Office:

- Ordinance
- Encroachment Agreement

Form and Correctness Approved: By 
Office of the City AttorneyContents Approved: By 
DEPT. General Services

NORFOLK, VIRGINIA

ORDINANCE No.

AN ORDINANCE GRANTING PERMISSION TO MUDDY PAWS TO ENCROACH INTO THE RIGHT OF WAY OF 37th STREET AT 3700 HAMPTON BOULEVARD AND 37th STREET AND APPROVING THE TERMS AND CONDITIONS OF THE ENCROACHMENT AGREEMENT.

- - -

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the terms and provisions of the Encroachment Agreement between the City of Norfolk and Muddy Paws, a copy of which is attached hereto as Exhibit A, are hereby approved, and in accordance therewith, permission is hereby granted to Muddy Paws ("Tenant") to encroach into the right of way of 37th Street at 3700 Hampton Boulevard with an area extending 5' with a stockade (50% open) fence and dumpster, 4' with a chain link fence, and 10' with parking into 37th Street right-of-way, having a total area of approximately 325 square feet, more or less, for the purpose of an outdoor dog play area. Tenant shall be permitted to lease the area to be encroached upon for an outdoor dog play area in conjunction with the operation of a boarding kennel approved by the City of Norfolk. Tenant shall continue to be responsible for its obligations with respect to the encroachment defined herein, regardless of who is operating in the encroachment area.

Section 2:- That the terms and conditions of the Encroachment Agreement, a copy of which is attached hereto, are hereby approved and the City Manager is hereby authorized to execute the Encroachment Agreement, to make amendments consistent with the terms and conditions and do all things necessary for its implementation.

Section 3:- That this ordinance shall be in effect from and after its adoption.

ENCROACHMENT AGREEMENT

This **ENCROACHMENT AGREEMENT** (hereinafter "Agreement") is made and entered into this _____ day of _____ 2015, by and between the **CITY OF NORFOLK**, a municipal corporation of the Commonwealth of Virginia (hereinafter "City"), and **MUDDY PAWS** (hereinafter "Tenant").

WITNESSETH:

1. **ENCROACHMENT AREA.** The City hereby grants permission to Tenant to encroach into the right of way of 37th Street at 3700 Hampton Boulevard, with an area extending 5' with a stockade (50% open) fence and dumpster, 4' with a chain link fence, and 10' with parking into 37th Street Right of Way, having a total area of approximately 325 square feet, more or less, as shown on Exhibit A attached hereto ("Encroachment Area"), for the purpose of an outdoor dog play area, and no other purpose.
2. **USE.** Tenant shall be permitted to occupy the Encroachment Area for an outdoor dog play area in conjunction with the operation of a boarding kennel approved by the City of Norfolk located at 3700 Hampton Boulevard, Norfolk, Virginia.
3. **TERM; TERMINATION.** The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on March 1, 2015, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on February 29, 2020. However, it is expressly understood that the permission granted hereby is expressly subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation, Muddy Paws, or its successors or assigns, if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area.
4. **COMPENSATION.** As compensation for the privilege of encroaching into the right of way, Tenant shall pay City annual rent in the amount of \$812.50 annually based on a rental rate of \$2.50 per square foot of the Encroachment Area, with an annual one and a half

percent (1.5%) escalation for five year term, and such rent to be paid in monthly installments as follows:

<u>Term</u>	<u>PSF</u>	<u>Annual</u>	<u>Monthly</u>
3/1/2015 – 2/29/2016	\$2.50	\$812.50	\$67.71
3/1/2016 – 2/28/2017	\$2.53	\$824.68	\$68.72
3/1/2017 – 2/28/2018	\$2.57	\$837.05	\$69.75
3/1/2018 – 2/28/2019	\$2.61	\$849.60	\$70.80
3/1/2019 – 2/29/2020	\$2.65	\$862.34	\$71.87

The rent shall be paid by check payable to the Norfolk City Treasurer and sent to the General Services whose address is 232 E. Main Street, Suite 250, Norfolk, VA 23510

5. **LATE FEES.** For any late payments received 5 days after the first of each month, Tenant shall pay a late fee of five percent (5%) of the amount not paid when due.

6. **UTILITIES.** The City shall not be responsible for utilities of any type used within the Encroachment Area. Tenant shall pay all utility meter and utility services charges for all utilities, including but not limited to gas, electricity, water, telephone, sewer, and any other necessary to serve the Encroachment Area.

7. **REPAIRS.** Tenant shall keep and maintain the Encroachment Area in good and complete state of repair and condition. Tenant shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and workmanlike manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.

8. **REQUIREMENTS OF PUBLIC LAWS.** Tenant shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state and municipal laws, ordinances and regulations applicable to the structure, use and occupancy of the Encroachment Area. In addition, Tenant shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.

9. **CITY'S RIGHT TO ENTER AND CURE.** The City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and making any repairs which City deems necessary as a consequence of any failure of Tenant to meet their obligations under this Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on demand. Any entry upon the Encroachment Area or cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Tenant default in making repairs.

10. **NOTICE.** Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

City: Department of General Services
232 E. Main Street, Suite 250
Norfolk, Virginia 23510

Tenant: Muddy Paws
3700 Hampton Boulevard
Norfolk, VA 23508

With copies to:

City Attorney
900 City Hall Building
810 Union Street
Norfolk, Virginia 23510

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

11. **ENVIRONMENTAL MATTERS.** Tenant agrees that it will not introduce onto the Encroachment Area any toxic, hazardous or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. Tenant will not allow any air, water or noise pollution to occur in the Encroachment Area. Tenant hereby agrees to use and occupy the Encroachment Area in a safe and reasonable manner and in accordance with applicable law.

City in turn agrees that Tenant shall not be responsible or assume liability for environmental conditions existing on or about the Encroachment Area prior to Tenant's occupancy thereof under this Agreement.

12. **DESTRUCTION.** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.

13. **NON-LIABILITY OF CITY.** The City shall not be liable for any damage or injury which may be sustained by Tenant or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, heating or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements; or resulting from acts, conduct or omissions on the part of Tenant, or their agents,

employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.

14. **REMOVAL OF SNOW.** Tenant agrees to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.

15. **ALTERATIONS.** Tenant covenants and agrees that it will not make any improvements, changes installations, renovations, additions or alterations in and about the Encroachment Area without the prior written consent of the City other than the approval given by Norfolk's Planning Commission on December 8, 2014, or subsequently approved modification to Encroachment Area. If Tenant installs or makes any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, Tenant hereby agrees to remove, if requested by City, any improvements, additions, installations, renovations, changes on or to the Encroachment Area upon termination of this Agreement. In the event Tenant fails to remove and is requested to do so by City, then City may remove the improvements, additions, installations, renovations, changes and Tenant shall pay for the cost of such removal.

16. **ASSIGNMENT AND SUBLETTING.** The City and Tenant agree that the permission to encroach granted hereby may not be assigned by Tenant without written approval from Norfolk's City Manager. City acknowledges that encroachment area is to be used for an outdoor dog play area and the outdoor dog play area may be operated by an agent or lessee of Muddy Paws.

17. **SURRENDER BY OWNER.** Tenant will surrender possession of the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Tenant shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of

Tenant's use of the Encroachment Area, reasonable wear and tear excepted. If Tenant has been requested to remove and fails to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and Tenant shall be liable to City for the cost of any removal and disposal.

18. **INSURANCE.** Tenant shall maintain during the term of this agreement insurance of the types and in the amounts described below. All general liability and automobile/vehicle liability policies will be written in an "occurrence" form unless otherwise specifically approved by the City. The CITY OF NORFOLK and its employees will be included as "Additional Insured" on such policies. Insurance policies shall provide that the Tenant will receive at least thirty (30) days written notice in the event of cancellation of, or material change in, any of the policies. If the Tenant fails to maintain the insurance as set forth in this Agreement, the City shall have the right, but not the obligation, to purchase such insurance at Tenant's expense

COMMERCIAL GENERAL LIABILITY INSURANCE. The Tenant shall maintain Commercial General Liability Insurance (CGL) and, if necessary, commercial umbrella insurance with a limit of not less than \$1,000,000 each occurrence, \$2,000,000 general aggregate. CGL insurance shall be written on an approved ISO form for coverage in the Commonwealth of Virginia, and shall cover liability arising from premises, operations, independent Owners, products-completed operations, personal injury and liability assumed under insured contract.

WORKER'S COMPENSATION INSURANCE AND EMPLOYER'S LIABILITY INSURANCE: The Tenant shall maintain the applicable statutory Workers' Compensation

Insurance, and Employer's Liability Insurance with a limit of at least \$500,000 per accident/disease, and policy limit of \$500,000.

INSURANCE POLICIES/CERTIFICATE OF INSURANCE

Tenant shall furnish the City with two (2) copies of the policies, or a certificate(s) of insurance evidencing policies as required. In the event of cancellation of, or material change in, any of the policies, the Tenant shall notify the City within at least 14 days after receiving notice of such cancellation or policy change and provide evidence that insurance coverage is in place to meet the requirements of this agreement.. If coverage on said certificate(s) is shown to expire prior to completion of all terms of this Agreement/Contract, the Tenant shall furnish a certificate of insurance evidencing renewal of such coverage to the City within 10 days of the effective date such renewal. All certificates shall be executed by a duly authorized representative of each insurer, showing compliance with the requirements of this agreement. Failure of the City, and/or the City's designated agents for this Agreement, to (1) demand such certificates or other evidence of full compliance with these requirements, and, or (2) identify a deficiency from evidence that is provided shall not be construed as a waiver of the Tenant's obligation to maintain such insurance.

19. **FIXTURES.** The City covenants and agrees that no part of the improvements constructed, erected or placed by Tenant in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and Tenant to covenant and agree that all improvements of every kind and nature constructed, erected or placed by Tenant in the Encroachment Area shall be and remain the property of Muddy Paws.

20. **ENVIRONMENTAL COMPLIANCE.**

(a) For purposes of this section:

(i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. SS6901 et seq.) (HRCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. SS9601 et seq.) (CERCLA) or any other federal, state, or local environmental law, ordinance, rule or regulation.

(ii) "Release" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing or dumping.

(iii) "Notice" means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPA) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of the Tenant, including but not limited to the Tenant's interest in the Leased Premises or any of Tenant's property located thereon, or any violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

(b) To the extent that Tenant may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, Tenant shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. Tenant shall not cause or permit, as a result of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, Tenant shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of City.

(c) Tenant shall comply with all applicable federal, state and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with any and all permits required thereunder or any successor or new environmental laws. Upon the receipt of any Notice, Tenant shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

(d) The requirements of this Section 20 shall apply to any successor in interest to Tenant, whether due to merger, sale of assets or other business combination or change of control.

(e) Tenant hereby agrees to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting

from Tenant's failure to comply strictly with the provisions of this Section 20. The provisions of this Section 20 shall survive the termination of this permission granted by this Agreement.

21. **LIENS OR ENCUMBRANCES.** If because of any act or omission of Tenant, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, Tenant shall, at its own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to Tenant of the filing thereof, and Tenant shall have the right to contest the validity of such lien if it so chooses.

22. **APPLICABLE LAW.** The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the Eastern District of Virginia.

23. **WAIVER OF TRIAL BY JURY.** To the extent permitted by law, the City and Tenant mutually waive their rights to trial by jury in any action, proceeding or counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to Tenant by this agreement.

24. **OTHER REQUIREMENTS.**

(a) Tenant shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.

(b) The use of the Encroachment Area shall be subject to the jurisdiction and review of the City of Norfolk's Design Review Committee.

(c) Tenant's use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.

25. **DOMESTIC OR FOREIGN BUSINESS COMPLIANCE.** Tenant, by executing this Agreement, certifies that it is authorized to transact business in Virginia as a domestic or foreign business entity as required by the State Corporation Commission, or as otherwise required by law. Tenant further certifies that it will maintain such status during the term of this Agreement. This Agreement is voidable at the option of the City if, at the time Tenant entered into this Agreement, it was not authorized to transact business in Virginia as a domestic or foreign business entity; or, having qualified to enter into this Agreement fails to maintain such status during its term.

IN WITNESS WHEREOF, Parties have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

THE CITY OF NORFOLK

By: _____
City Manager

ATTEST:

City Clerk

MUDDY PAWS

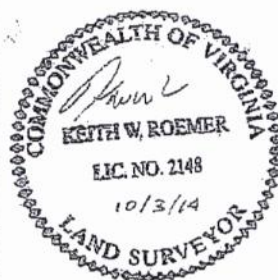
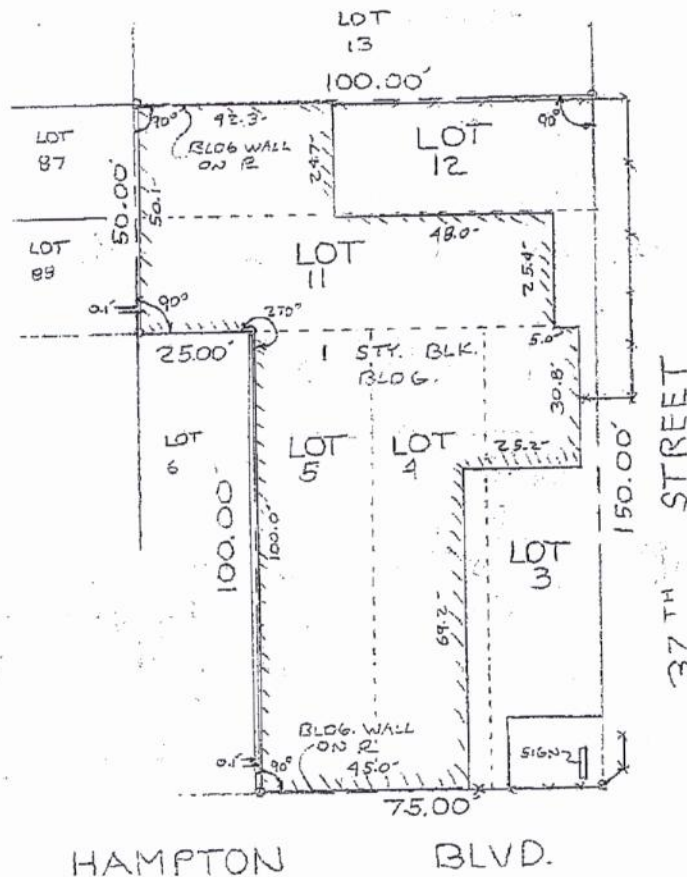
By: _____
Title:

APPROVED AS TO CONTENTS:

Department of Development

FORM & CORRECTNESS APPROVED:

Deputy City Attorney



Reference: M.B.5 Pg. 30 + 31

NOTE: Property shown hereon lies in -

Flood Zone: X

Comm. Panel: 510104

Date: 9/02/09

3700 HAMPTON BLVD.

Plat of the property of:

I certify that on OCT. 3, 2014, I surveyed the property shown hereon, and that the boundary lines and physical improvements are as shown, and that there are no encroachments except as shown. This survey was completed without the benefit of a title report.

Signed: *Keith W. Roemer*

Roemer Land Surveyors
213 Palen Avenue
Newport News, VA 23601
757.572.2203

LOTS 3, 4, 5, 11, & 12
BLOCK 220

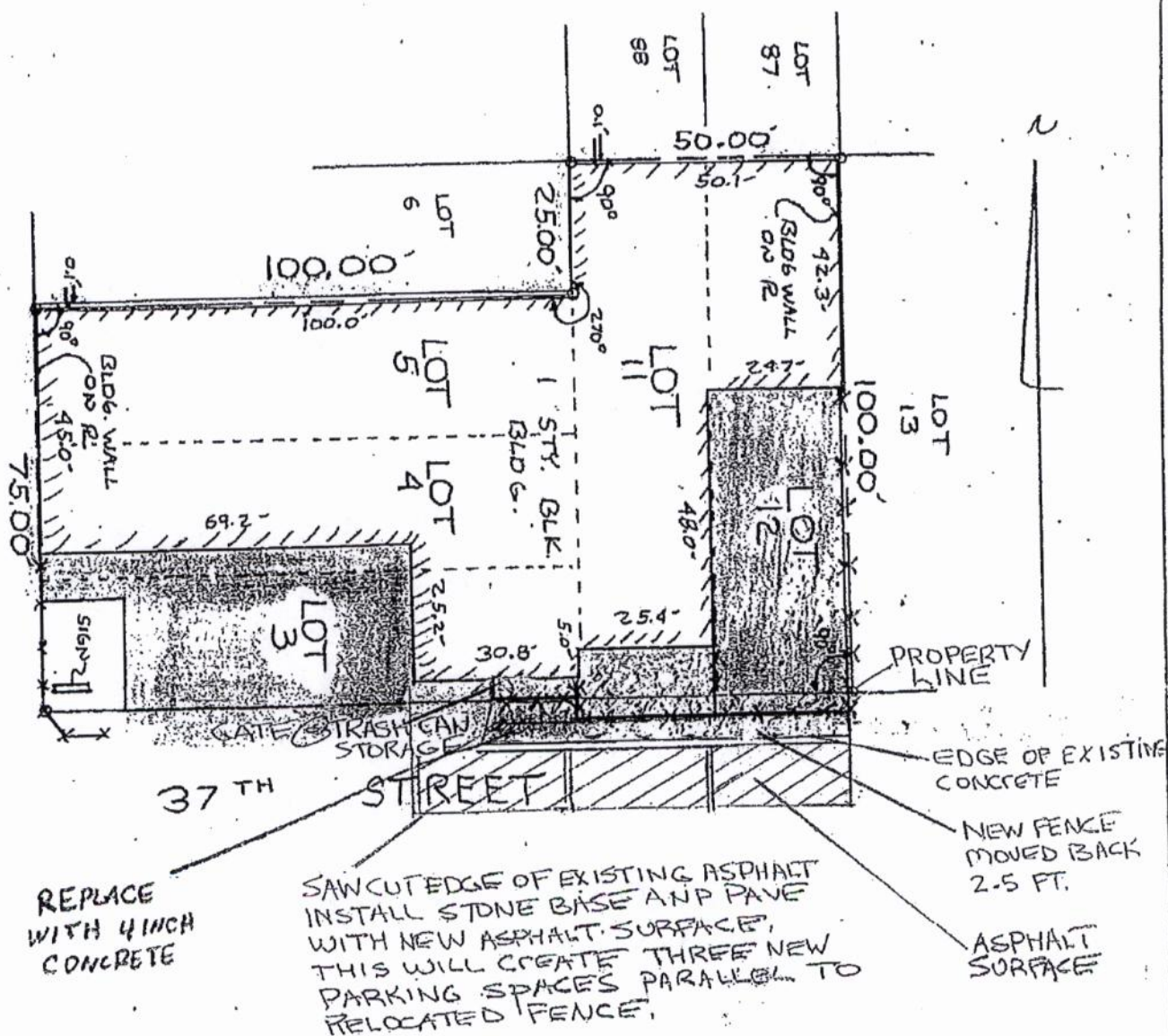
LAMBERTS POINT
NORFOLK, VA.

Scale: 1 inch = 30'

FB: 30 PG: 30

HAMPTON

BLVD.



100' BLVD. AND 37 TH STREET.